

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-198

INQUIRY CONCERNING A JUDGE, NO. 06-52

RE: CHERYL ALEMÁN.

**RESPONDENT'S RESPONSE AND OBJECTION TO
MOTION TO TAX COSTS**

Respondent Judge, CHERYL ALEMÁN, by and through undersigned counsel, hereby moves the Hearing Panel of the Florida Judicial Qualifications Commission for the entry of a Report and Recommendation to the Supreme Court of Florida assessing costs against the Respondent Judge, in accord with the opinion of the Florida Supreme Court in this matter and in accord with Florida law, in an amount not to exceed \$4670.02.

As grounds therefor, Respondent states as follows:

1. Rule 2.310(c) of the Florida Rules of Judicial Administration provides, *inter alia*, that: “The supreme court may award reasonable and necessary costs, including costs of investigation and prosecution, to the prevailing party.” Fla. R. Jud. Admin. 2.310(c) (emphasis supplied).

2. In the case before this Hearing Panel, Respondent Judge was the prevailing party on every accusation made by the JQC in its initial inquiry, its initial formal charges and its amended formal charges, and at trial, except one. The

sole count on which the JQC prevailed, (hereafter referred to as “the Braynen count”) was not "temporally related" to any of the plethora of accusations alleged, charged, and tried by the JQC against Respondent Judge. See *In re Cope*, 848 So.2d 301 (Fla. 2003), citing *Moritz v. Hoyt Enters., Inc.*, 604 So.2d 8807 (Fla. 1992).

3. Accordingly, the Florida Supreme Court specifically ordered that the JQC's request to impose reasonable and necessary costs must be strictly limited to the reasonable and necessary costs relating only to the Braynen count. See *Inquiry Concerning a Judge*, No 06-52, opinion, 9/29/2008. General Counsel for the JQC acknowledged this limitation imposed by the Supreme Court in paragraph one of its Motion to Tax Costs.

4. Notwithstanding his acknowledgement that its request for costs must be limited to only the reasonable and necessary costs "related to the Braynen count," counsel for the JQC has moved this Hearing Panel for a Report and Recommendation to the Supreme Court for an order imposing costs which are: (a) not related to the Braynen count; and (b) not “reasonable and necessary.”

5. The burden of proof is upon the Movant to establish that any costs it seeks are: (a) related to the Braynen count; and (b) both “reasonable and necessary.”

COSTS - NOT "RELATED TO BRAYNEN"

5. **Judge Alemán Deposition 9/18/2007.** Movant requests that costs be imposed upon Respondent Judge in the amount of \$1314.00 for "deposition of Judge Alemán on 9/18/2007." However, it is indisputable that the vast majority (nearly 77%) of said deposition was completely unrelated to the Braynen count. In fact, a review of the transcript reveals that no more than 45 pages of 191 total pages (23%) bears any relationship whatever to the Braynen count. Accordingly, the line item for this deposition should be reduced by \$1004.42 to a total of \$309.58.

6. **Gottlieb Deposition 10/31/2007.** Movant requests costs in the amount of \$436.05 for "depositions of Gottlieb and Raticoff on 10/31/2007." However, it is indisputable that Mr. Gottlieb had no relationship whatever to the Braynen count. Not a single page of Mr. Gottlieb's deposition testimony was related to the Braynen matter. Accordingly, the cost of a copy of Mr. Gottlieb's deposition is not recoverable, and the line item for should be reduced by the sum of \$155.00. In addition, the extra charges for CD ROM/MINI TRANSCRIPT/EXHTS, SCANNED EXHIBITS/TABS, and COURIER SERVICE are special request services which are not related to the cost of obtaining a copy of the relevant deposition. These items should be denied. This item should be reduced to \$229.40, the cost of a copy of Mr. Raticoff's deposition.

7. **6(b) Hearing held 8/25/2006.** Movant requests that costs be imposed upon Respondent Judge in the amount of \$342.00 (\$274.50 + \$67.50) for the "6(b) Hearing held 8/25/2006." However, again, it is indisputable that more than 95% of said hearing was completely unrelated to the Braynen count. In fact, a review of the transcript reveals that no more than 6 pages of 122 total pages bore any relationship whatever to the Braynen count. Accordingly, Movant cannot demonstrate that any more than \$16.82 of said expense is related to the Braynen matter and said line item should be reduced by \$325.18 to no more than a total of \$16.82, or should be denied in full.

8. **Prehearing conference held 5/24/2007.** Movant requests costs be imposed upon Respondent Judge in the amount of \$222.50 for the "prehearing conference held 5/24/2007." However, Movant cannot demonstrate that it was "necessary" or "reasonable" to have any of this conference transcribed. Said transcription was not necessary for investigation or trial of the Braynen count. Accordingly, said line item for \$222.50 must be denied.

9. **Trial transcript 12/4-12/6/2007.** Movant requests costs be imposed upon Respondent Judge in the amount of \$4827.58 for a transcript of the entire trial, rather than just of that portion of the trial related to the Braynen count. Half of the counts upon which the JQC proceeded to trial were unrelated to the Braynen count to which sole count any request for costs, by Order of the Supreme Court,

must be confined. A review of the trial transcript shows that more than 22% of the trial transcript (213 of 958 pages) is completely unrelated to the Braynen count. Accordingly, said line item should be reduced by \$1073.36 to \$3754.22.

COSTS - NOT "RELATED TO BRAYNEN"
AND NOT "NECESSARY AND REASONABLE"

10. **Videographer on Judge Alemán Deposition 9/18/2007.** Movant request costs be imposed in the amount of \$1,100.00 for the completely unnecessary cost of a "videographer on 9/18/2007 deposition."

First, depositions are rarely videotaped and for good reason: they are unnecessarily expensive and it is not "reasonable" to incur such expenses. The presence of a certified court reporter for Judge Aleman's deposition was more than sufficient to investigate and prosecute the Braynen count.

Further, Movant cannot meet its burden to prove that such an unusual and extravagant cost was "necessary." Said video tape was never used at trial, nor would its use ever have been necessary at trial on the Braynen count, since every word of Respondent judge's deposition testimony was fully transcribed and available for impeachment purposes, if impeachment were ever to be necessary.

Second, it is indisputable that the vast majority (nearly 77%) of said videotape was completely unrelated to the Braynen count. In fact, a review of the

transcript of the video reveals that no more than (23%) of the video bears any relationship whatever to the Braynen count (45 pages of 191 total pages).

Therefore, *even if* this Panel were to find that, in addition to a word-for-word transcription of a judge's deposition, it is also reasonable and necessary for trial to videotape that judge's deposition for the sole purpose of proving the Braynen count, only \$259.16 of the videotaped deposition of Judge Alemán had any relationship whatever to the Braynen count.

Accordingly, since Movant cannot meet its burden to demonstrate that the extraordinary cost of a videographer -- in addition to a certified court reporter -- was "necessary" and the "reasonable," specifically in the establishment of the Braynen count, said amount of \$1100.00 must be deleted from the costs imposed on Respondent Judge.

Conclusion

WHEREFORE, pursuant to the ruling of the Supreme Court in this inquiry and given, as Movant concedes, the burden of proof is upon the JQC to establish that the costs it seeks are "related to the Braynen count" and are "reasonable" and "necessary" costs, Respondent Judge moves the Hearing Panel for entry of a Report and Recommendation to the Supreme Court of Florida that costs be taxed upon Respondent not to exceed \$4,899.42, as follows:

Deposition Costs:

a.	Deposition of Judge Alemán on 9/18/2007	\$ 309.58
b.	Depositions of Holden, Gardiner, and Civile on 10/16/2007	\$ 589.40
c.	Deposition of Raticoff on 10/31/2007	<u>\$ 229.40</u>
	Total Deposition Expenses	\$1,128.38

Hearing and Trial Costs:

a.	6(b) Hearing held 8/25/2006	\$16.82
b.	Pre-hearing conference held 5/24/2007	\$ 0.00
c.	Trial transcript	<u>\$3,754.22</u>
	Total Hearing and Trial Costs	\$3,771.04
	TOTAL COSTS:	\$4,899.42

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing has been furnished to Michael Louis Schneider, General Counsel, Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303 by U.S. Mail on this 23rd day of February, 2009.

J. DAVID BOGENSCHUTZ

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